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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

JASON A. REDON,

Plaintiff,

vs.

ANDRES RUIZ, et al.,

Defendants.

CASE NO. 13cv1765-WQH(KSC)

**ORDER GRANTING DEFENDANTS'  
EX PARTE APPLICATION FOR AN  
ORDER COMPELLING PLAINTIFF  
TO PROVIDE WRITTEN  
RESPONSES TO DISCOVERY AND  
A RELEASE OF MEDICAL  
RECORDS**

[Doc. No. 34.]

Before the Court is defendants' Ex Parte Application for an Order Compelling Written Discovery Responses and Release of Medical Records [Doc. No. 34] and plaintiff's Opposition thereto [Doc. No. 36]. Defendants' Ex Parte Application indicates that plaintiff did not serve timely responses to defendants' interrogatories and document requests. As a result, defendants seek an order compelling plaintiff to provide written responses to these discovery requests. In addition, defendants seek an order requiring plaintiff to execute an authorization form, so they can subpoena his medical and mental health records. Defendant's Ex Parte Application and plaintiff's Opposition also raise a number of case management issues, including a request to continue the current deadline for completing fact discovery as a result of plaintiff's failure to provide responses to discovery requests. [Doc. No. 34-1, at p. 5.] These other

1 issues will be addressed in separate orders for the convenience of the Court and/or  
2 because they have been raised in more than one Ex Parte Application.

3 For the reasons outlined more fully below, the Court finds that defendants'  
4 Ex Parte Application for an order compelling plaintiff to provide responses to  
5 interrogatories and document requests must be GRANTED with certain limitations.  
6 The Court also finds that defendants' request for an order compelling plaintiff to  
7 provide defendants with an executed authorization form for his medical and mental  
8 health records must be GRANTED with certain limitations.

### 9 Background

10 In this civil rights action, plaintiff is proceeding *pro se*.<sup>1</sup> [Doc. No. 8, at p. 1.]  
11 The Amended Complaint ("Complaint") filed on December 23, 2013 includes causes  
12 of action against defendants for violations of plaintiff's civil rights under Title 42,  
13 United States Code, Section 1983; the Americans with Disabilities Act ("ADA"); and  
14 state law. In an Order filed on July 28, 2014, the District Court dismissed all of  
15 plaintiff's state law causes of action as time-barred. [Doc. No. 23, at p. 6.] In addition,  
16 the District Court's July 28, 2014 Order dismissed plaintiff's Section 1983 cause of  
17 action against defendants for failure to implement appropriate policies, customs, and  
18 practices. Any and all allegations against Jan Goldsmith (City Attorney) and Miriam  
19 Milstein were also dismissed by the District Court's Order of July 28, 2014 for failure  
20 to state a claim and prosecutorial immunity. [Doc. No. 23, at pp. 7-8.] Based on the  
21 foregoing, plaintiff's remaining causes of action against defendants are for alleged  
22 constitutional violations under Section 1983 for: (1) excessive force; (2) false arrest;  
23 (3) deprivation of property without Due Process; (4) cruel and unusual punishment; and  
24 (5) violations of the ADA.

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26 <sup>1</sup> *Pro se* litigants are afforded some leniency to compensate for their lack  
27 of legal training. "In civil rights cases where the plaintiff appears *pro se*, the court  
28 must construe the pleadings liberally and must afford plaintiff the benefit of any  
doubt." *Jackson v. Carey*, 353 F.3d 750, 757 (9<sup>th</sup> Cir. 2003) (internal citation omitted).  
This also applies to motions. *Bernhardt v. Los Angeles County*, 339 F.3d 920, 925  
(9<sup>th</sup> Cir. 2003). Accordingly, plaintiff's *pro se* status will be taken into consideration  
by the Court when his filings are reviewed.

1 Plaintiff's factual allegations relate to two separate incidents on May 3, 2011 and  
2 August 19, 2011. In both of these incidents, plaintiff claims police officers acted  
3 improperly and subjected him to unnecessary and excessive force.

4 **May 3, 2011 Incident:** The Complaint states that plaintiff dialed 9-1-1 on  
5 May 3, 2011 and asked for assistance in finding his wife and four-month old daughter,  
6 because his wife ran out of their home with the child but without any food, clothing,  
7 or diapers. An officer arrived but told plaintiff there was nothing he could do to help.  
8 [Doc. No. 8, at p. 3.] Later the same day, plaintiff's wife returned with the child and  
9 began packing to leave, but plaintiff refused to let her take the child again. As a result,  
10 plaintiff's wife dialed 9-1-1 and said plaintiff had taken the child. [Doc. No. 8, at p. 3.]  
11 Before officers arrived, plaintiff gave the child to his wife. When officers arrived,  
12 plaintiff alleges they forced him outside of the home and allowed his wife to gather her  
13 belongings. The officers then escorted plaintiff's wife, child, and dog out of the home.  
14 [Doc. No. 8, at p. 4.]

15 Next, plaintiff vented his frustration over the situation by making statements on  
16 Facebook. These statements caused relatives and friends to be concerned enough to  
17 dial 9-1-1 and ask for mental health officials to check on plaintiff. When the officers  
18 arrived, plaintiff allegedly told them he was fine; apologized for wasting their time;  
19 thanked them for checking on him; and asked them to leave. [Doc. No. 8, at p. 4.]  
20 Instead, plaintiff alleges that officers attacked him; wrestled him to the ground; hog  
21 tied him; laid him face down in the hallway; and began applying "pain compliance  
22 techniques." [Doc. No. 8, at p. 4.] According to the Complaint, officers bent plaintiff's  
23 fingers and limbs and kicked, elbowed, and punched him for five to seven minutes.  
24 Officers then dragged plaintiff out to the street and sat him in a squad car. [Doc. No.  
25 8, at p. 4.]

26 While in the squad car, plaintiff alleges her overheard officers talking about  
27 falsifying reports to say plaintiff was armed with a knife when officers arrived. [Doc.  
28 No. 8, at p. 4.] Plaintiff was then transported to a San Diego County Mental Health

1 facility, where he claims he was admitted and held against his will for 72 hours. [Doc.  
2 No. 8, at p. 4.] After being released from the 72-hour hold, plaintiff returned to live  
3 with his wife. [Doc. No. 8, at p. 4.]

4 **August 19, 2011 Incident:** On August 19, 2011, plaintiff's wife called 9-1-1  
5 reporting that plaintiff had their child, was bi-polar, and smoked marijuana. She also  
6 claimed plaintiff had pushed her and spit on her. However, during the course of the  
7 conversation with the 9-1-1 operator, plaintiff's wife realized she made a mistake, said  
8 everything was fine, and told the operator it was not necessary for anyone to come out  
9 to investigate. However, the operator informed plaintiff's wife that officers were  
10 required to investigate all reports of domestic violence. [Doc. No. 8, at p. 5.]

11 About 30 minutes after the 9-1-1 call, Officer Ruiz and Officer Jordan arrived  
12 but everything was calm by this time, and the couple's child was asleep on plaintiff's  
13 shoulder. [Doc. No. 8, at p. 5.] Plaintiff's wife told the officers they could come inside  
14 but everything was fine. Plaintiff recognized Officer Jordan from the prior incident on  
15 May 3, 2011. Plaintiff was asked to step outside, and Officer Jordan directed plaintiff  
16 to put the child down on an adult bed. Believing it would be unsafe to place a child  
17 unattended on a bed, plaintiff said, "No." After Officer Jordan repeated his request,  
18 plaintiff's wife offered to take the child. [Doc. No. 8, at p. 5.]

19 When the couple began to exchange the child, the Complaint alleges that officers  
20 "without a word of warning" grabbed plaintiff, kneed him, and placed him in a "carotid  
21 choke." [Doc. No. 8, at p. 5.] Plaintiff allegedly lost consciousness and was lowered  
22 to the ground. Officer Ruiz then allegedly pulled out his Taser gun and "deployed" it  
23 at "point blank range" into the left side of plaintiff's chest and then into his knee. [Doc.  
24 No. 8, at p. 6.] Once he regained consciousness, plaintiff was arrested and taken to the  
25 hospital. [Doc. No. 8, at p. 6.]

26 As a result of these incidents, plaintiff claims he "suffered serious personal  
27 injuries and loss of companionship of his wife and child for a period of 4 months."  
28 [Doc. No. 8, at p. 12.] He also claims that he suffers from fear, anxiety, and "severe

1 emotional distress.” [Doc. No. 8, at p. 9, 13-15.] In the prayer for relief, plaintiff seeks  
 2 general, compensatory, and punitive damages. [Doc. No. 8, at p. 19-20.] Plaintiff also  
 3 seeks injunctive relief in the form of an order requiring the San Diego Police  
 4 Department to refrain from using Taser guns and to rewrite their use of force matrix to  
 5 comply with the Constitution. In addition, plaintiff seeks an order requiring defendants  
 6 to seal and destroy all documents and records referring to him or his arrest between  
 7 May 3, 2012 and January 20, 2013. [Doc. No. 8, at pp. 20.]

### 8 Discussion

#### 9 I. Plaintiff’s Failure to Provide Timely Responses.

10 On March 5, 2015, the Court issued a Scheduling Order Regulating Discovery  
 11 and Other Pre-Trial Proceedings. The Scheduling Order set July 31, 2015 as the  
 12 deadline for completing fact discovery. [Doc. No. 31, at p. 2.] On April 13, 2015,  
 13 defendants served plaintiff with written discovery requests. At the same time,  
 14 defendants also requested that plaintiff sign a release for his medical records. [Doc. No.  
 15 34-1, at p. 3.] Plaintiff’s responses to defendants’ discovery requests were due on  
 16 May 18, 2015. [Doc. No. 34-1, at p. 3; Doc. No. 34-2, at p. 2.] Copies of these written  
 17 discovery requests to plaintiff were submitted in support of defendants’ Ex Parte  
 18 Application as Exhibit A to defense counsel’s Declaration. These written discovery  
 19 requests include: (1) Special Interrogatories (Set One), Nos. 1-23; and (2) Request for  
 20 Production of Documents (Set One), Nos. 1-22. [Doc. No. 34-2, at p. 2; Doc. No. 34-4,  
 21 at pp. 1-20.] As of June 15, 2015, the date defense counsel filed the instant Ex Parte  
 22 Application, plaintiff had not provided defendants with any responses to the written  
 23 discovery requests.<sup>2</sup> [Doc. No. 34-1, at p. 3.]

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 26 <sup>2</sup> In a later Declaration filed in support of an Ex Parte Application to Amend  
 27 the Scheduling Order filed on October 6, 2015, defense counsel did report that plaintiff  
 28 provided responses to written discovery on July 21, 2015, long after they were due, but  
 stated his responses are “woefully deficient.” [Doc. No. 47-2, at p. 2.] As a result, the  
 Court finds that these later responses do not moot defendants’ request for an order  
 compelling plaintiff to respond.

1 According to defendants, plaintiff has provided a variety of reasons for not  
 2 responding to their written discovery. Defense counsel unsuccessfully attempted to  
 3 resolve this discovery dispute with plaintiff through the meet and confer process  
 4 required by Federal Rule 37(a)(1), Local Rules, and Chambers' Rules. [Doc. No. 34-3,  
 5 at pp. 1-5.] Plaintiff then declined to participate in the joint motion process required  
 6 by Chambers' Rules to raise discovery disputes before the Court, and, as a result,  
 7 defense counsel filed the instant Ex Parte Application. [Doc. No. 34-1, at p. 4.]

8 In his Opposition to defendant's Ex Parte Application, plaintiff presents a  
 9 number of reasons why he did not provide timely responses to defendants' written  
 10 discovery requests.<sup>3</sup> [Doc. No. 36.] Many of his arguments relate to defendants'  
 11 requests seeking access to his medical and mental health records. However, plaintiff's  
 12 reasons for not responding are essentially objections, so they do not justify a complete  
 13 failure to respond.

14 When a party is served with interrogatories under Federal Rule 33 or with  
 15 document requests under Federal Rule 34, the party must provide written responses and  
 16 any objections "within 30 days after being served." Fed.R.Civ.P. 33(b)(2)-(4);  
 17 34(b)(2)(A)-(D). "A party seeking discovery may move for an order compelling an  
 18 answer . . . if: . . . (iii) a party fails to answer an interrogatory submitted under Rule  
 19 33; or (iv) a party fails to respond that inspection will be permitted—or fails to permit  
 20 inspection—as required under Rule 34." Fed.R.Civ.P. 37(a)(3)(B).

21 As noted above, defendant submitted evidence indicating plaintiff did not  
 22 provide defendant with any written responses or objections as required under the  
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24 <sup>3</sup> One of plaintiff's reasons for not responding to defendants' written  
 25 discovery requests is that defendants have "yet to provide plaintiff with any discovery  
 26 requested." [Doc. No. 36, at p. 12.] However, defendants' Ex Parte Application was  
 27 filed to raise disputes related to defendants' discovery requests, not plaintiff's.  
 28 Plaintiff "should not seek this Court's approval of a 'tit for tat' approach to litigation."  
*Acushnet Co. v. Birdie Golf Ball Co., Inc.*, 166 F.R.D. 42, 43 (S.D. Fla. 1996). The  
 Federal Rules do not contain a provision "authorizing a litigant to behave only as well  
 as his opponent." *Id.* Plaintiff's remedy for responses he considers inadequate is, of  
 course, to meet and confer and timely file a Joint Motion or Ex Parte Application if the  
 dispute cannot be resolved without the Court's assistance.



1 Federal Rules. Instead, plaintiff essentially advised defendants by telephone and e-mail  
 2 that he would not provide any responses to written discovery. [Doc. No. 34-2, at pp.  
 3 2-3.] Therefore, the Court finds that defendants' request for an order compelling  
 4 plaintiff to respond to their April 13, 2015 discovery requests must be GRANTED.

5 As noted above, *pro se* litigants are afforded some leniency to compensate for  
 6 their lack of legal training. However, this leniency "does not constitute a license for  
 7 a plaintiff filing *pro se* to ignore the Federal Rules of Civil Procedure." *Moore v.*  
 8 *Agency for Intern. Dev.*, 994 F.2d 874, 876 (D.C. Cir. 1993), quoting *Jarrell v. Tisch*,  
 9 656 F.Supp. 237, 239 (D.D.C. 1987). "[P]ro se litigants are bound by the rules of  
 10 procedure." *Ghazali v. Moran*, 46 F.3d 52, 54 (9<sup>th</sup> Cir. 1995). Failure to follow  
 11 procedural rules "is a proper ground for dismissal." *Id.* at 53. "The severe sanction of  
 12 dismissal with prejudice may be imposed even against a plaintiff who is proceeding *pro*  
 13 *se*, so long as a warning has been given that noncompliance can result in dismissal.  
 14 *Valentine v. Museum of Modern Art*, 29 F.3d 47, 50 (2d Cir. 1994).

15 ***Here, plaintiff is forewarned that he must provide timely responses in writing***  
 16 ***to defendants' discovery requests, even if he has objections.*** Any objections must be  
 17 included in plaintiff's responses on a request-by-request basis. Because plaintiff failed  
 18 to provide timely responses to defendants' written discovery requests served on or  
 19 about April 13, 2015, defendants are entitled to an order compelling him to respond.  
 20 ***If plaintiff does not respond as ordered, this Court will impose sanctions pursuant***  
 21 ***to Federal Rule of Civil Procedure 37(b)(2)(A) and/or Rule 37(b)(2)(C), up to and***  
 22 ***including a recommendation to the District Court that the action be dismissed.***

## 23 **II. Plaintiff's Objections to Defendants' Written Discovery Requests.**

24 Although defendants represented in a later Ex Parte Application that plaintiff did  
 25 provide responses to discovery on July 21, 2015, long after they were due, defendants  
 26 also stated that the responses plaintiff finally did provide "are woefully deficient."  
 27 [Doc. No. 47-2, at p. 2; Doc. No. 31, at p. 2.] For example, defendants claim that  
 28 plaintiff refused to provide a list of his medical and mental health providers even

1 though he claims multiple physical injuries and severe emotional distress, including  
2 Post Traumatic Stress Disorder. [Doc. No. 47-2, at pp. 2-3.] Defendants also represent  
3 that plaintiff claims loss of wages but did not provide any wage information. [Doc. No.  
4 47-2, at p. 2.] In addition, defendants state that plaintiff “has not produced a single  
5 document” in response to any of their discovery requests. [Doc. No. 47-2, at p. 3.]

6 Although the parties have not formally presented issues related to the adequacy  
7 of plaintiff’s July 21, 2015 responses to defendants’ April 13, 2015 written discovery  
8 requests, the Court has reviewed copies of these discovery requests, because they were  
9 submitted as Exhibit A to the instant Ex Parte Application. [Doc. No. 34-4, at pp. 1-  
10 17.] With the hope of avoiding another motion about the adequacy of plaintiff’s  
11 responses, the Court will address plaintiff’s main objections to these discovery requests  
12 as expressed in his Opposition to defendants’ Ex Parte Application. [Doc. No. 36.]

13 In general, plaintiff believes defendants’ written discovery requests are “overly  
14 invasive” and “oppressive” and seek documents and information that are irrelevant,  
15 private, overly burdensome, and expensive. [Doc. No. 36-1, at p. 6.] Plaintiff’s specific  
16 objections to defendants’ written discovery requests relate mostly to the disclosure of  
17 information and/or documents concerning his medical and mental health. First,  
18 plaintiff does not believe his medical condition and mental health are relevant.  
19 Plaintiff believes he has not put his medical condition or mental health in controversy  
20 in this action, because he does not plan to offer medical expert testimony and he is only  
21 seeking “garden variety” damages. [Doc. No. 36, at p. 3, 44, 45-46. 52.] According to  
22 plaintiff, it is defendants who have put plaintiffs’ medical condition and mental health  
23 at issue, but this does not mean he should be compelled to produce his private  
24 information and records. [Doc. No. 36, at p. 3.]

25 Second, plaintiff believes his medical records and information are protected from  
26 disclosure by the doctor-patient privilege. [Doc. No. 36, at p. 43.] Third, plaintiff  
27 claims that his mental health records and information are protected by the  
28 psychotherapist-patient privilege, and he has not waived the privilege because he seeks



1 only “garden variety” damages for emotional suffering and does not intend to rely on  
2 expert testimony at trial. [Doc. No. 36, at p. 44-45; Doc. No. 36-1, at pp. 2-6.] He also  
3 does not believe he has waived the psychotherapist-patient privilege because he has not  
4 put his mental health at issue. Rather, plaintiff believes it is defendants who are  
5 attempting to put his medical condition and mental health at issue so they can further  
6 their “character assassinations” of plaintiff and justify their actions. [Doc. No. 36, at  
7 pp. 46-47, 49-53.]

8 Fourth, plaintiff believes he has an interest in protecting the privacy of his  
9 medical and mental health records, and “there are less intrusive means” than  
10 defendants’ request for a “blanket medical release.” [Doc. No. 36, at p. 45.] Plaintiff  
11 contends that defendants should have to request specific information from specific  
12 doctors during a specific time frame and should not be allowed to rifle through  
13 plaintiff’s medical and mental health records “carte blanche” looking for “damning  
14 information.” [Doc. No. 36, at p. 6, 45.] Plaintiff also seeks to protect the privacy of  
15 third parties who may be mentioned in his medical and mental health records, such as  
16 his wife, family, and friends. [Doc. No. 36, at p. 43, 45.]

17 **A. Relevance Standard.**

18 “Parties may obtain discovery regarding any nonprivileged matter that is relevant  
19 to any party’s claim or defense . . . . For good cause, the court may order discovery of  
20 any matter relevant to the subject matter involved in the action. Relevant information  
21 need not be admissible at the trial if the discovery appears reasonably calculated to lead  
22 to the discovery of admissible evidence.” Fed.R.Civ.P. 26(b). Discovery may be  
23 limited if the Court determines it is unreasonably cumulative, duplicative, overly  
24 burdensome, or too expensive “considering the needs of the case, the amount in  
25 controversy, the parties’ resources, the importance of the issues at stake in the action,  
26 and the importance of the discovery in resolving the issues.” Fed.R.Civ.P. 26(b)(2)(C).

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1           **B. Physician-Patient Privilege and Privacy of Medical Records.**

2           “Assertions of privileges in federal question cases are governed by federal  
3 common law (Rule 501, Federal Rules of Evidence). The physician-patient privilege  
4 is not recognized by federal common law, federal statute, or the U.S. Constitution. . . .  
5 Therefore, [plaintiff] may not rely on the physician-patient privilege or medical records  
6 privilege to withhold records. Nor may he rely on a right of privacy, since this right  
7 is only available explicitly under the California Constitution and may be abrogated  
8 where justified under federal law.” *Hutton v. City of Martinez*, 219 F.R.D. 164, 166  
9 (2003). “[A] plaintiff must disclose medical records relating to any condition he  
10 himself puts at issue.” *Doe v. Presiding Bishop of Church of Jesus Christ of Latter-*  
11 *Day Saints*, 837 F.Supp.2d 1145, 1157 (D. Idaho 2011), citing *Maynard v. City of San*  
12 *Jose*, 37 F.3d 1396, 1402 (9<sup>th</sup> Cir. 1994). “Medical records unrelated to the conditions  
13 put in issue by a plaintiff are not relevant and are thus not discoverable, regardless of  
14 whether a specific privilege is applicable.” *Doe v. Presiding Bishop*, 837 F.Supp.2d  
15 at 1167.

16           Based on the allegations in the operative Complaint, the Court must reject  
17 plaintiff’s contention that his medical records are not relevant and/or that he has not put  
18 his medical condition at issue in this lawsuit. The operative Complaint includes  
19 allegations demonstrating that plaintiff has put his medical condition at issue. The  
20 introduction of the Complaint states that plaintiff “was injured from improper use of  
21 force. . . .” [Doc. No. 8, at p. 1.] The Complaint also states that plaintiff suffered both  
22 physical and “serious personal injuries” as a result of defendants’ actions against him.  
23 [Doc. No. 8, at p. 1-2, 12, 13.]

24           Under these circumstances, plaintiff is obligated to provide defendant with full  
25 and complete responses to written discovery requests to the extent they seek:  
26 (1) identification of any physical, mental, or emotional injuries plaintiff claims to have  
27 suffered as a result of the incidents alleged in the Complaint; (2) documents or  
28 information identifying all of plaintiff’s health care providers for a reasonable time

1 prior to the incidents alleged in the Complaint through and including the present date;  
 2 (3) documents or information identifying any health care providers who treated  
 3 plaintiff for any physical or personal injuries he claims he incurred as a result of the  
 4 incidents alleged in the Complaint; (4) documents or information showing plaintiff's  
 5 disability status at the time of the incidents described in the Complaint; (5) medical  
 6 records and reports for a reasonable time prior to the incidents described in the  
 7 Complaint that relate or refer to any injuries plaintiff suffered that were to the same or  
 8 similar parts of plaintiff's body that he claims to have injured in the incidents alleged  
 9 in the Complaint. For example, if plaintiff injured his knee in 2010 and received  
 10 treatment for that injury in 2010 and claims to have injured the same leg, knee, or foot  
 11 during the incidents alleged in the Complaint, plaintiff must disclose any and all  
 12 medical treatment records that relate to the 2010 knee injury. To protect plaintiff's  
 13 privacy, any and all medical information or records produced by plaintiff will be  
 14 subject to the Protective Order filed in this case on May 26, 2015 [Doc. No. 33].

15 **C. Psychotherapist/Patient Privilege and Waiver.**

16 In *Jaffee v. Redmond*, 518 U.S. 1 (1996), the United States Supreme Court held  
 17 that confidential communications between a licensed psychotherapist, psychologist, or  
 18 social worker and his or her patients "in the course of diagnosis or treatment are  
 19 protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence."  
 20 *Id.* at 15. According to the Supreme Court, this privilege serves important public and  
 21 private interests by "facilitating the provision of appropriate treatment for individuals  
 22 suffering the effects of a mental or emotional problem" and by promoting "frank and  
 23 complete" disclosure of sensitive information needed for successful treatment. *Id.* at  
 24 10-12.

25 As with "other testimonial privileges," the Supreme Court in *Jaffee v. Redmond*  
 26 acknowledged that the patient may waive the privilege. *Id.* at 15 n.14. However, the  
 27 Supreme Court did not state what facts and circumstances would be necessary to  
 28 constitute a waiver. The Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1, did reject

1 the “balancing” approach previously taken by other courts. *Id.* at 17. In this regard,  
2 the Supreme Court stated as follows: “Making the promise of confidentiality  
3 contingent upon a trial judge’s later evaluation of the relative importance of the  
4 patient’s interest in privacy and the evidentiary need for disclosure would eviscerate  
5 the effectiveness of the privilege. . . . An uncertain privilege, or one which purports  
6 to be certain but results in widely varying applications by the courts, is little better than  
7 no privilege at all.” *Id.* at 17-18.

8 Federal Courts have approached the issue of waiver in several different ways.  
9 In some cases, such as *Vanderbuilt v. Town of Chilmark*, 174 F.R.D. 225 (D. Mass.  
10 1997), a narrow approach to waiver has been applied, so that no waiver has occurred  
11 unless the patient “relies on the advice or findings of her psychotherapist.” *Id.* at 229.  
12 For example, a patient cannot rely on the privilege if he or she calls his or her  
13 psychotherapist as a witness, testifies about the substance of a communication with his  
14 or her psychotherapist, or sues his or her psychotherapist for professional malpractice.  
15 *Id.* The plaintiff in *Vanderbuilt* complained about unlawful discrimination and  
16 retaliation by her employer and sought damages for “emotional distress.” *Id.* at 225.  
17 The defendant employer sought to compel production of her mental health records and  
18 deposition testimony by her treating mental health professionals. However, the District  
19 Court concluded that the plaintiff had not waived the privilege, because she did not  
20 intend to call her psychotherapist as a witness or testify about the substance of their  
21 communications herself. *Id.* at 226. *See also Fitzgerald v. Cassil*, 216 F.R.D. 632  
22 (N.D. Cal. 2003) (applying the narrow approach to waiver of the psychotherapist-  
23 patient privilege where a couple alleged harassment by their landlord which caused  
24 them emotional distress but stipulated they did not intend to rely on a treating  
25 psychotherapist or other expert to prove emotional distress damages).

26 Other cases, such as *Sarko v. Penn-Del-Directory Co.*, 170 F.R.D. 127 (E.D. Pa.  
27 1997), have taken a broader approach by holding that the privilege is waived if the  
28 plaintiff places her mental condition directly at issue in the action. *Id.* at 130. The

1 plaintiff in *Sarko* alleged unlawful discrimination under the Americans with  
 2 Disabilities Act (ADA). “[A]s the first element of her prima facie case” she was  
 3 required to establish she belonged to a “protected category” of “qualified individuals  
 4 with a disability” under the ADA, and she claimed she was disabled by “clinical  
 5 depression.” *Id.* As a result, the Court concluded she “placed her mental condition  
 6 directly at issue in the case,” so the privilege was waived as to all confidential  
 7 communications she had with her mental health provider during the time she was  
 8 employed by the defendant.<sup>4</sup> *Id.* at 130-131.

9 Similarly, the District Court in *Equal Employment Opportunity Commission*  
 10 (*EEOC*) v. *California Psychiatric Transitions*, 258 F.R.D. 391 (2009), applied the  
 11 “broad approach” to waiver based on the particular facts of a case involving alleged  
 12 employment discrimination and sexual harassment of female employees. *Id.* at 392-  
 13 393, 400. One of the plaintiffs, who was seeking to recover damages for emotional  
 14 distress, testified in a deposition that she resigned her position “in part over sexual  
 15 harassment;” immediately consulted with a mental health practitioner; and was  
 16 permanently disabled by depression. *Id.* at 398. In reaching its determination that the  
 17 psychotherapist/patient privilege had been waived, the District Court stated as follows:  
 18 “Although no specific emotional injury was alleged, or no claim of intentional  
 19 infliction of emotional distress was made, the only remedy the EEOC is seeking on  
 20 behalf of [the plaintiff] is emotional distress damages resulting from the alleged sexual  
 21 harassment. Thus, the emotional distress damages is the crux of plaintiff’s claim. The  
 22 fact that [the plaintiff] is being treated for depression suggests that multiple causation  
 23 for her emotional distress may exist. The emotional distress she allegedly suffered as  
 24 a result of the sexual harassment could have been effected by her depression and vise

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26 <sup>4</sup> “For each item of damages, whether economic or non-economic, the  
 27 plaintiff must show that the damage was proximately caused by the defendant’s  
 28 unlawful conduct. In turn, the [defendant] is entitled to show that other factors  
 contributed to the plaintiff’s damage.” *Doe v. City of Chula Vista*, 196 F.R.D. 562, 568  
 (S.D. Cal. 1999).

1 versa. Defendant should be able to determine whether plaintiff's emotional state may  
2 have been effected by something other than defendant's alleged actions." *Id.* at 400.

3 Other cases have distinguished between "garden variety" and more severe  
4 categories of emotional distress to determine whether the psychotherapist/patient  
5 privilege has been waived. *Flowers v. Owens*, 274 F.R.D. 218, 225-226 (N.D. Ill.  
6 2011) and cases cited therein. "Under this approach, courts have generally found a  
7 waiver when the plaintiff has done more than allege 'garden variety' emotional  
8 distress." *Fitzgerald v. Cassil*, 216 F.R.D. 632, 637 (N.D. Cal. 2003). "Garden  
9 variety" emotional distress has been described in a number of ways, such as "the  
10 distress that any healthy, well-adjusted person would likely feel as a result of being so  
11 victimized;" "the generalized insult, hurt feelings and lingering resentment which  
12 anyone could be expected to feel' given the defendant's conduct;" and general pain and  
13 suffering that is not serious enough to require psychological treatment or to disrupt or  
14 affect the claimant's life activities. *Flowers v. Owens*, 274 F.R.D. at 225-226 (internal  
15 citations omitted). "[S]ince garden variety emotional suffering involves those feelings  
16 that would likely be experienced by anyone who experienced what the plaintiff alleges  
17 occurred, prohibiting a party's access to []privileged information, does not compromise  
18 the ability of the opponent to contest the evidence of emotional damage and thus does  
19 not offend notions of fairness." *Id.* at 226.

20 As in this case, the plaintiff in *Flowers v. Owens*, 274 F.R.D. at 218, claimed  
21 civil rights violations and sought compensatory and punitive damages. His complaint  
22 alleged physical and "emotional injuries" as a result of being beaten while in custody.  
23 *Id.* at 220. Defendants sought discovery of plaintiff's mental health records and a  
24 deposition of his psychologist/social worker. *Id.* at 221. Plaintiff opposed, arguing this  
25 discovery was protected by the psychotherapist/patient privilege, because he was only  
26 claiming "garden variety" damages for emotional distress. To prevent a waiver of the  
27 privilege, he had agreed not to introduce any expert testimony at trial about his  
28 emotional suffering and to limit evidence of emotional distress to the negative



1 emotions he experienced as a result of the defendant's alleged misconduct, such as  
2 humiliation and embarrassment. He also agreed to exclude evidence of physical  
3 symptoms he might have experienced, such as sleeplessness, nervousness, or  
4 depression. *Id.* at 220. However, the plaintiff's deposition testimony was inconsistent  
5 with his claim of "garden variety" emotional distress. His deposition testimony  
6 indicated he suffered from severe anxiety on a daily basis, could not leave his home  
7 without a high level of fear, and continued to get depressed about the incident three  
8 years after it happened. *Id.* at 220-222. As a result, the District Court concluded the  
9 plaintiff's symptoms, as expressed in his deposition testimony, exceeded a "garden  
10 variety" claim of emotional damages, so the plaintiff could not expect to present this  
11 evidence at trial without waiving the psychotherapist/patient privilege. *Id.* at 226-229.

12 In cases applying this "broad approach," a waiver of the psychotherapist/patient  
13 privilege is "based upon the obvious principle of fairness that a party 'cannot inject his  
14 or her psychological treatment, conditions, or symptoms into a case and expect to be  
15 able to prevent discovery of information relevant to those issues.'" *Flowers v. Owens*,  
16 274 F.R.D. at 225, quoting *Santelli v. Electro-Motive*, 188 F.R.D. 306, 309 (N.D. Ill.  
17 1999). "[I]t is only fair to allow defendant access to the information. To protect the  
18 records would allow plaintiff to proceed with a claim on unequal terms. If [the plaintiff  
19 wants a jury to compensate him for emotional distress], defendant should be able to  
20 explore in discovery, other circumstances that may have caused the injury. . . ."  
21 *E.E.O.C. v. California Psychiatric Transitions*, 258 F.R.D. at 400.

22 The Court also notes that no privilege protects "[f]acts regarding the very  
23 occurrence of psychotherapy, such as dates of treatment." *Vanderbuilt*, 174 F.R.D. at  
24 230. Therefore, "if plaintiff was seeing a psychotherapist before any actionable  
25 emotional injury allegedly occurred, the dates of such pre-existing treatment would be  
26 available to defendants." *Id.* See also *In re Zuniga*, 714 F.2d 632, 640 (6<sup>th</sup> Cir. 1983)  
27 (finding that "as a general rule, the identity of a patient or the fact and time of his  
28 treatment does not fall within the scope of the psychotherapist-patient privilege");

1 *Richardson v. Sexual Assault/Spouse Abuse Center, Inc.*, 764 F.Supp. 2d 736, 743  
 2 (N.D. Md. 2011) (finding that “disclosure of an individual’s receipt of services is not  
 3 tantamount to a disclosure of confidential information and does not waive the  
 4 privilege”); *Merrill v. Waffle House, Inc.*, 227 F.R.D. 467, 471 (N.D. Tex. 2005)  
 5 (concluding that “[t]he names of mental health care providers . . . and dates of treatment  
 6 are not subject to the privilege”); *Santelli v. Electro-Motive*, 188 F.R.D. at 310  
 7 (concluding defendant was entitled to discover the identity of plaintiff’s  
 8 psychotherapists and the dates of treatment as this information was not privileged).

9 Based on the allegations in the Complaint, the Court must reject plaintiff’s  
 10 contentions that his mental health information and records are not relevant and/or that  
 11 he has not put his mental health at issue in this lawsuit. The Complaint includes a  
 12 number of allegations demonstrating that plaintiff’s mental health is a key issue in the  
 13 case. First, the Complaint alleges that plaintiff suffers from “fear and anxiety” and  
 14 “severe emotional distress” as a result of the incidents described in the Complaint.  
 15 [Doc. No. 8, at p. 9.] More specifically, the Complaint states that these incidents have  
 16 “created an environment of fear and anxiety for the couple making the most basic of  
 17 daily activities such as travel to and from work wrought with fear, danger and  
 18 uncertainty, creating severe emotional distress.” [Doc. No. 8, at p. 9.] The first cause  
 19 of action alleges that plaintiff’s “mental health arrest” was unconstitutional. [Doc. No.  
 20 8, at pp. 9-10.]

21 The third cause of action in the Complaint alleges that officers used excessive  
 22 force against plaintiff which resulted in “both physical and mental injuries,” as well as  
 23 “serious personal injuries and loss of companionship of his wife and child for a period  
 24 of 4 months. . . .” [Doc. No. 8, at p. 12.] Plaintiff’s fourth cause of action for false arrest  
 25 alleges plaintiff “suffered serious personal injuries and special damages.” [Doc. No. 8,  
 26 at p. 13.] Plaintiff’s seventh cause of action for violations of the ADA alleges that  
 27 officers acted in a discriminatory manner “based on actual and perceived mental health  
 28 issues. . . .” [Doc. No. 8, at p. 14.] The Court notes that a discrimination claim against

1 a governmental entity under the ADA generally requires proof that the plaintiff is a  
2 “qualified individual with a disability.” *Duvall v. County of Kitsap*, 260 F3d 1124,  
3 1135 (9<sup>th</sup> Cir. 2001).

4 By including these allegations in his Complaint, plaintiff raises more than a  
5 “garden variety” claim of emotional distress. Under these circumstances, he has  
6 waived the psychotherapist/patient privilege as to his mental condition for a reasonable  
7 time prior to the incidents alleged in the Complaint to the present. As in the cases cited  
8 above, defendants are entitled to discover documents and information about plaintiff’s  
9 mental health to ensure a fair resolution of the case. Accordingly, the Court finds that  
10 plaintiff must provide full and complete responses to defendants’ written discovery  
11 requests to the extent they seek: (1) the identity of mental health professionals that have  
12 examined or provided treatment to plaintiff for a reasonable time prior to the incidents  
13 described in the Complaint up to the present; (2) identification of any medications  
14 taken by plaintiff to address mental health issues, prescribed or not, for a reasonable  
15 time prior to the incidents described in the Complaint to the present; (3) all mental  
16 health records and reports for a reasonable time prior to the incidents described in the  
17 Complaint to the present, including but not limited to any records maintained by the  
18 County of San Diego Health and Human Services Agency concerning the incident on  
19 May 4, 2011, when officers transported plaintiff to a mental health facility.

20 **D. Defendants’ Written Discovery Requests Served April 13, 2015.**

21 On the other hand, the Court agrees with plaintiff to the extent he contends that  
22 certain of defendants’ written discovery requests are overly broad as to time and seek  
23 access to medical and mental health records and other information that are not relevant  
24 under the circumstances of the case. For this reason, the defendants’ written discovery  
25 requests are modified to read as follows:

26 **Special Interrogatory No. 3:** Identify all doctors, medical practitioners, mental  
27 health professionals, hospitals, clinics, or any other health care provider, as defined in  
28 California Code of Civil Procedure 677.7(e)(3), that examined or rendered treatment

1 to you in the two (2) years prior to the incidents alleged in the operative Complaint or  
2 who treated you for any mental or physical injuries you contend you suffered as a result  
3 of the incidents alleged in the operative Complaint.

4 Special Interrogatory No. 6: Have you taken any medication, prescribed or not,  
5 as a result of mental health disorder(s) in the two (2) years prior to the incidents  
6 described in the operative Complaint? If so, for each medication state: (a) the name  
7 of the medication; (b) the person who prescribed or furnished the medication; (c) the  
8 date the medication was prescribed or furnished; (d) the dates you began and stopped  
9 taking the medication; and (e) the cost incurred to date for any such medications.

10 Special Interrogatory No. 9: State the name, address and telephone number of  
11 all health care providers from who you have received physical or psychiatric care for  
12 the two years prior to the incident through and including the present date.

13 Special Interrogatory No. 12: Identify any and all activities that you were  
14 participating in for the two years prior to the incidents described in the operative  
15 Complaint for which you contend you are no longer able to participate in as a result of  
16 these incidents.

17 Special Interrogatory No. 13: Except for this action, list the court(s), names of  
18 the parties, and case number(s) of any action(s) you filed or made a written claim for  
19 or demand for compensation for bodily injuries and/or a violation of your civil rights  
20 during the two years prior to the incidents alleged in the Complaint up to the present.

21 Request for Production No. 7: All documents that evidence, reflect, refer, or  
22 relate to your disability status prior to or at the time of the incident.

23 Request for Production No. 13: All documents, including all medical records and  
24 reports, from 2009 to the present, that reflect, refer, or relate to any injuries you  
25 suffered prior to the incidents alleged in the Complaint that were to the same or similar  
26 parts of your body that you claimed to have injured in the incidents alleged in the  
27 Complaint.

28 ///

1        Request for Production No. 17: All documents evidencing any health insurance  
 2 or state or federally funded programs providing health care benefits to you that were  
 3 in effect at the time of the incidents described in the Complaint or after the dates of the  
 4 incidents described in the Complaint, including any documents evidencing a summary  
 5 of coverage, an explanation of benefits, the extent of coverage, or claims made as a  
 6 result of the incidents described in the Complaint. Plaintiff need not provide a copy  
 7 of any insurance card.

8        Request for Production No. 22: All documents that relate to your treatment with  
 9 the County of San Diego Health and Human Services Agency, including your mental  
 10 health records from 2009 through the present.

11        As to all of defendants' other written discovery requests served April 13, 2015  
 12 [Doc. No. 34-4, at pp. 1-20 (Exhibit A)], the Court finds that defendants are seeking  
 13 documents and information that meet the relevance standard of Federal Rule 26(b).  
 14 These discovery requests are not objectionable for any reason. As a result, plaintiff  
 15 must provide defendants with full and complete responses to these discovery requests  
 16 without limitation or modification by the Court. As noted above, if plaintiff fails to  
 17 respond as ordered by the Court, he risks the imposition of sanctions pursuant to  
 18 Federal Rule of Civil Procedure 37(b)(2)(A) and/or Rule 37(b)(2)(C), up to and  
 19 including a recommendation to the District Court that the action be dismissed.

20        ***E.    Costs and Procedures for the Production of Documents to Defendants.***

21        In his Opposition to defendants' Ex Parte Application, plaintiff expresses  
 22 concern about the cost of obtaining copies of his medical and mental health records to  
 23 produce to defendants. [Doc. No. 36, at p. 14.] According to plaintiff, defendants  
 24 retained an imaging company that charges \$55 per location plus 61 cents per page so  
 25 copying costs could exceed \$1,000. Plaintiff states that he is unable to afford this high  
 26 cost and believes defendants are attempting to "scare" him into "dropping his case due  
 27 to excessive cost." [Doc. No. 36, at p. 14.] However, Rule 34 only requires plaintiff to  
 28 make relevant documents available to defendants for inspection and copying. Plaintiff

1 need not pay defendants' copying costs. Federal Rule of Civil Procedure 34(a)  
2 provides that: "A party may serve on any other party a request . . . to produce and  
3 *permit* the requesting party or its representative *to inspect, [or] copy* . . . items *in the*  
4 *responding party's possession, custody, or control*. . . ." Fed.R.Civ.P. 34(a)(1)  
5 (emphasis added). Even if plaintiff does not have actual custody or possession of his  
6 medical and mental health records, he does have control over them, because he has the  
7 right to access them himself. To make the documents available to defendants for  
8 inspection and copying, plaintiff must complete, sign, date, and return the  
9 Authorization form provided by defendants. Of course, if plaintiff wants his own  
10 copies of these documents, he must pay for them unless his health care providers are  
11 willing to provide him with copies at no cost or at a lower cost.

12 For some unexplained reason, plaintiff also seems to believe discovery  
13 documents must be sealed and lodged with the Court "under the joint protective order."  
14 [Doc. No. 36, at p. 14.] However, there is no discernable reason for the Court to  
15 become involved in the production of any documents by plaintiff. The Protective  
16 Order only provides for documents to be filed with the Court under seal if it becomes  
17 necessary for either party to present a confidential document to the Court for  
18 consideration in connection with a motion or trial. [Doc. No. 33, at pp. 1-11.] The  
19 purpose of the Protective Order is to facilitate the exchange of confidential documents  
20 and information between the parties during the discovery process and to protect the  
21 parties' privacy by limiting the use of confidential documents and information as set  
22 forth in the Protective Order. [Doc. No. 33, at pp. 1-11.]

### 23 Conclusion

24 With the limitations outlined above, IT IS HEREBY ORDERED that  
25 defendants's Ex Parte Application is GRANTED. [Doc. No. 34.] As limited above,  
26 defendants are entitled to an Order compelling plaintiff to provide full and complete  
27 responses to their written discovery requests. Accordingly, IT IS ORDERED THAT:

28 ///



1           1.     **No later than December 18, 2015**, plaintiff shall serve defendants with  
2 full and complete responses to the following discovery requests served by defendants  
3 on April 13, 2015: (1) Special Interrogatories (Set One), Nos. 1-23; and (2) Request  
4 for Production of Documents (Set One), Nos. 1-22. [Doc. No. 34-2, at p. 2; Doc. No.  
5 34-4, at pp. 1-20 (Exhibit A).] Plaintiff's responses shall be limited as explained herein  
6 but otherwise shall be WITHOUT OBJECTION.

7           2.     **No later than December 18, 2015**, plaintiff shall provide defendants with  
8 an Authorization form that has been completed, signed, and dated to permit defendants  
9 to inspect and copy his medical and mental health records as outlined above.

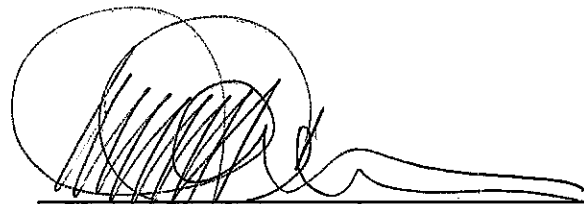
10          3.     Defendants shall ensure that they only copy the medical and mental health  
11 records permitted by this Order.

12          4.     To protect plaintiff's privacy, any responses or documents produced  
13 pursuant to this Order that include plaintiff's medical, mental health, or financial  
14 information shall be subject to the Protective Order filed on May 26, 2015. [Doc. No.  
15 33.]

16                 **Once again, plaintiff is forewarned that sanctions may be imposed against**  
17 **him, including dismissal of the entire action, if he fails to provide full and complete**  
18 **responses and a completed Authorization form as ordered by the Court.** Fed.R.Civ.P.  
19 37(b)(2)(A).

20                 IT IS SO ORDERED.

21                 Date: Dec. 4, 2015

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23  
24                           
25                         KAREN S. CRAWFORD  
26                         United States Magistrate Judge  
27  
28